No. 95-129

In The

Supreme Court of the United States

October Term, 1995

EXXON COMPANY, U.S.A.;
EXXON SHIPPING COMPANY,

Petitioners,

v.

SOFEC, INC.; PACIFIC RESOURCES, INC.;
HAWAIIAN INDEPENDENT REFINERY, INC.;
PRI MARINE, INC.; PRI INTERNATIONAL, INC.,

Respondents,

v.

GRIFFIN WOODHOUSE, LTD.,
BRIDON FIBRES AND PLASTICS, LTD.,

Third-Party Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY TO RESPONDENTS' AND THIRD-PARTY RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SHIRLEY M. HUFSTEDLER
Counsel of Record
MORRISON & FOERSTER
555 West Fifth Street
Suite 3500
Los Angeles, California 90013-1024
(213) 892-5200

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Contrary to respondents' arguments, the decision below is irreconcilable with the admiralty policies established by this Court. The conflicts among the circuits about the effect of a shipowner's negligence upon a defendant's liability for breach of admiralty warranties and for liability in tort are very real and very important to the merchant shipping industry. Those conflicts cannot be erased by contending that all of the other cases are factually distinguishable. This Court's admiralty principles do not change because the precise facts of each case to which they are applicable may vary. Otherwise, the Court could not establish admiralty law binding upon the Nation upon which domestic and foreign shipowners can rely.

The opinion below disregards this Court's admiralty policy. Admiralty policy applied to products liability, negligence, and breach of warranty actions imposes liability on the party best situated to take safety measures to reduce the likelihood of injury. *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986); *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397, 405 n.11, 95 S. Ct. 1708, 44 L. Ed. 2d 251 (1975); *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., Inc.*, 376 U.S. 315, 324, 84 S. Ct. 748, 11 L. Ed. 2d 732 (1964). Neither petitioners (hereinafter "Exxon") nor the HOUSTON's Captain had any control over the SPM or the dangerously defective equipment furnished by the respondents that created the hazards of stranding for every tanker moored there and danger to Oahu's environment as well. The respondents, not Exxon, were in the best position to make the SPM and its equipment safe, and they took no steps to do so.

Constitutional Error

Contrary to respondents' arguments (Resp. Br. at 27-29), neither constitutional error nor disobedience of

Reliable Transfer and *Italia Societa* arose simply from the district court's initial bifurcation order. Exxon was denied a fair trial by the combination of the bifurcation order *plus* the court's later orders *plus* entry of judgment against Exxon which continued to foreclose it from ever proving its liability case-in-chief.

Respondents led the lower courts into error by persuading them that the common-law doctrine of superseding cause is applicable in admiralty to exonerate them from all liability for loss, even though they had conceded that their own conduct was a cause-in-fact of the casualty. In fact and in admiralty law, causation was no longer in issue after their concession. The only question was whether, as a matter of legal policy, an act or event that intervened after their own egregious misconduct should shift the entire liability to Exxon. Contributory negligence has not relieved an admiralty defendant from tort liability since this Court decided *The Max Morris*, 137 U.S. 1, 14-15, 11 S. Ct. 29, 34 L. Ed. 586 (1890). Only in the Ninth Circuit does contributory negligence of a plaintiff exonerate a defendant from liability for breach of an admiralty warranty.

Intercircuit Conflict

1. Relying on this Court's decision in *Reliable Transfer*, the Eleventh Circuit has held that the common-law doctrine of superseding cause cannot exonerate an admiralty defendant for liability for negligence. *Hercules, Inc. v. Stevens Shipping Co.*, 765 F.2d 1069, 1075-76 (11th Cir. 1985). The Ninth, Eighth and Fifth Circuits have reached a contrary conclusion. *E.g., Exxon Co. v. SOFEC, Inc.*, 54 F.3d 570, 573-75 (9th Cir. 1995); *Lone Star Indus., Inc. v. Mays Towing Co., Inc.*, 927 F.2d 1453, 1459 (8th Cir. 1991); *Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 652-53 (5th Cir. 1992).

2. The superseding cause doctrine is applicable to exonerate a defendant from liability for breach of admiralty warranties in the Ninth Circuit. *Exxon Co.*, 54 F.3d at 575-76. The Second Circuit reaches the opposite result.

International Ore & Fertilizer Corp. v. SGS Controlled Services, Inc., 38 F.3d 1279 (2d Cir. 1994); *Paragon Oil Co. v. Republic Tankers, S.A.*, 310 F.2d 169, 173-74 (2d Cir. 1962), *cert. denied*, 372 U.S. 967, 83 S. Ct. 1092, 10 L. Ed. 2d 130 (1963).

RESPONDENTS' COUNTERSTATEMENT OF THE CASE IS INACCURATE

Petitioners mention only a few of the instances in which respondents' brief distorts the facts. Contrary to respondents' "perspective" (Resp. Br. at 3), the HOUSTON's fatal voyage did not begin at the SPM, but from the mainland; the vessel would not have gone to Oahu without the HIRI respondents' warranty of safe berth to protect Exxon's tanker and her cargo. Neither Exxon's prior uneventful moorings at the SPM nor contractual acceptance of HIRI's designating that mooring is relevant. (*Ibid.*) Before the tanker left the mainland, the HIRI respondents had actual knowledge (and Exxon did not) that the mooring was unsafe; their own experts had warned them that breakouts were inevitable unless they took recommended safety measures, which the HIRI respondents ignored. The HIRI respondents also knew (and Exxon did not) that two tankers had broken away before they warranted the SPM's safety. All of the respondents had actual or imputed knowledge (and Exxon did not) that the mooring equipment was dangerously defective.

Respondents boldly tell this Court that their acts and omissions before the HOUSTON's breakout are none of this Court's business. (Resp. Br. at 4.) Of course they are. Courts cannot decide what risks a defendant must voluntarily assume or are imposed by law when he breaches a contract without knowing the terms of the contract and the facts constituting the breach; neither can courts decide what risks a defendant voluntarily or involuntarily assumed when he commits a tort without the

court's knowing the legal duties created by the relationships between the parties and the nature of the breach of those duties. Those facts dictate the applicable legal principles for deciding liability.

The hazard of the HOUSTON's stranding was one of the risks that the HIRI respondents assumed when they breached their warranty of safe berth; breach of express and implied admiralty warranties imposes strict liability. Respondents also were required to accept the risk of stranding when they furnished Exxon with dangerously defective mooring equipment; strict product liability for those defects also applied.

In either contract or tort, it is immaterial whether the HOUSTON's Captain responded calmly or anxiously to the perils in which the respondents' breaches of duty placed the HOUSTON (Resp. Br. at 5), or whether the Captain's choice in ordering the tanker turned was wrong from a hindsight point of view (Resp. Br. at 10-12). Respondents' statement that "just 35 minutes after the breakout . . . , the cargo hose was under the positive control of the NENE; control the NENE did not relinquish until after the stranding" (Resp. Br. at 7) is contradicted by the indisputable facts that shortly before the Captain ordered the final turn, the hose caused the crane to collapse which injured the crane operator, threatened serious injury to the entire deck crew, and threatened potential destruction of the tanker by explosion.

Respondents cannot deny that the HOUSTON was crippled by the trailing hose from the breakout until moments before stranding or that the hose would not have trailed if the HIRI respondents had not removed the quick-release safety devices before the breakout, contrary to the advice of their own experts. They cannot deny that the lines parted which were supposed to have secured the HOUSTON to the SPM, thereby casting her adrift.

I. THE DISTRICT COURT'S ORDERS FORECLOSING EXXON FROM EVER PROVING ITS LIABILITY CASE-IN-CHIEF DEPRIVED EXXON OF DUE PROCESS AND VIOLATED THIS COURT'S APPLICABLE ADMIRALTY POLICIES

Respondents convinced the district court that judicial time and further discovery could be saved by trying solely the Captain's conduct *after* the breakout and by foreclosing Exxon from producing any of its evidence of respondents' egregious breaches of duty *before* the breakout. Respondents argued that by trying only the Captain, the court could potentially resolve the whole case because if it found the Captain was grossly negligent and that his negligence was a superseding cause of the casualty, none of the respondents would have any liability. The Court accepted the argument over Exxon's strenuous objections; Exxon was permitted only to make a brief offer of proof with respect to its entire case-in-chief.

Exxon nevertheless hoped that it would be able to offer evidence on its liability case in the anticipated second phase of the trial. That expectation was thwarted because the district court concluded that the Captain's navigation of the stricken tanker was extraordinarily negligent and relieved respondents of all liability at the conclusion of the first phase of the case. No damages issues were ever reached. The district court entered judgment against Exxon as if none of the respondents' multiple breaches of duty to Exxon before the breakout had anything to do with liability. The court disregarded the indisputable facts that the navigability of the tanker was severely restricted by the trailing cargo hose and that hose would never have broken or trailed if the safety devices had been in place. The hose created severe danger to the vessel and her crew. That hose, then trailing from the NENE, reduced the navigation choices as late as the moment when the Captain issued his final order to turn the tanker.

The curtain on this maritime drama did not rise for the first time when the tanker was cut adrift from the mooring. The rights and duties of the HIRI respondents arose when Exxon executed its contract with them to sell them a tanker of crude oil for delivery at the SPM. The contract contained a specially negotiated safe berth warranty in Exxon's favor. The warranty was breached before the HOUSTON left the mainland because the respondents had actual knowledge that the berth was unsafe when the warranty was executed. The HIRI respondents also owed Exxon a duty of reasonable care when the vessel was moored at their SPM which they breached because they knew (1) that SPM failures were inevitable, (2) that two tankers had broken away before the HOUSTON reached Oahu, (3) that their mooring masters had not been trained to manage stricken tankers after a breakout, (4) that they had no assist vessels powerful enough to assist a stricken tanker, and (5) that they had removed the safety devices from the cargo hoses and replaced them with heavy bolts that were the antithesis of quick release mechanisms when the SPM failed. All of the respondents knew or were chargeable with knowledge that the equipment furnished to Exxon at the mooring was dangerously defective.

The district court's foreclosure orders and ultimate judgment, affirmed by the Ninth Circuit, prevented Exxon from proving that respondents were liable for the loss of the vessel even if the court had correctly found that the Captain's navigation was grossly negligent. His negligence did not relieve respondents from liability for either breach of admiralty warranties or strict products liability. The same orders and judgment prevented the lower courts from ever comparing the Captain's fault with the fault of respondents as required by *Reliable Transfer* because their serious misconduct occurred before the breakout.

II. THE CIRCUITS ARE IN CONFLICT ON THE APPLICATION OF SUPERSEDING CAUSE AFTER *RELIABLE TRANSFER*

The Fifth, Eighth and Ninth Circuits hold that the common law doctrine of superseding cause applies in admiralty cases to exonerate the defendants from liability for negligence after *Reliable Transfer*. *Lone Star Indus., Inc.*, 927 F.2d at 1459; *Donaghey*, 974 F.2d at 652-53 (relying on *Lone Star Indus.*); *Protectus Alpha Navigation Co., Ltd. v. N. Pacific Grain Growers, Inc.* 767 F.2d 1379, 1384 (9th Cir. 1985); *Hunley v. Ace Maritime Corp.*, 927 F.2d 493, 497-98 (9th Cir. 1991).

Hercules, Inc. v. Stevens Shipping Co., 765 F.2d 1069, 1075-76 (11th Cir. 1985) reached the opposite conclusion.[1]

III. THE NINTH CIRCUIT IS IN CONFLICT WITH THE SECOND CIRCUIT IN APPLYING TORT PRINCIPLES TO BREACH OF ADMIRALTY CONTRACTS

The Second Circuit follows the usual contract rule that a breaching party is not excused from liability by negligence of the non-breaching party. *International Ore & Fertilizer Corp.*, 38 F.3d at 1286; *Paragon Oil Co.*, 310 F.2d at 173-74; *Venore Transp. Co. v. Oswego Shipping Corp.*, 363 F. Supp. 1366, 1370 (S.D.N.Y. 1973), *modified on other grounds*, 498 F.2d 469 (2d Cir.), *cert. denied*, 419 U.S. 998, 95 S. Ct. 313, 42 L. Ed. 2d 272 (1974). *See also Ore Carriers of Liberia, Inc. v. Navigen Co.*, 435 F.2d 549, 550-51 (2d Cir. 1970).

In our case, the Ninth Circuit held that the Captain's negligence exonerated respondents from all liability for

---

[1] Taking their cue from the opinion below, respondents argue that *Hercules, Inc.* may not be contrary because the court may only have rejected the doctrine of "normal intervening cause," not superseding cause. The suggestion does not make legal sense. Common-law "normal intervening cause" has no effect on liability; there was nothing to reject.

breach of their warranty of safe berth. Damage issues were never reached. As this Court explained in *Italia Societa*, a shipowner's negligence in tort does not defeat liability for breach of an admiralty warranty. *Italia Societa*, 376 U.S. at 321. After cause-in-fact has been conceded, the question is not whether the breach caused a shipowner's injury, but whether the shipowner's negligence, if any, constituted a failure to mitigate damages. This Court has not transferred concepts of legal (or "proximate") cause in common-law negligence cases to admiralty actions for breach of warranty. *Ibid.*

Respondents' brief confuses issues of liability with issues of damages. (Resp. Br. at 22-23.) The respondents fail to recognize that their quotation from *Paragon Oil Co.*, 310 F.2d at 173-74 states the principle of mitigation of damages, not a principle applied to decide liability in an action for breach of contract.[2] Contributory negligence is not a defense to liability for breach of warranty.

"Foreseeability" in contract law imposes limits on recoverable damages. Since *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 45 (1854) was decided, general damages recoverable for breach of contract are confined to those which actually arise from the breach or which might have been contemplated or foreseen by reasonable persons as the probable result of a breach when the contract was made. That is the very point made by the authorities cited by respondents on the role of foreseeability. (Resp. Br. at 24-25.)

Likewise within the contemplation of a reasonable person when a warranty of safe berth is negotiated is that the vessel subject to the warranty may ground and her

---

[2] Contrary to respondents' argument, contributory negligence has never been a liability defense in admiralty warranty cases. In negligence cases, after *The Max Morris* and before *Reliable Transfer*, contributory negligence triggered divided damages; post-*Reliable Transfer*, contributory negligence requires comparing degrees of fault.

cargo may be lost if a safe berth warranty is breached. Reasonable people in the maritime trade who have negotiated a safe berth warranty are also aware that, when the warranty is breached, the masters of vessels in dangerous circumstances may not respond with the quality of seamanship that may seem appropriate to the warrantor or his experts from a defensive hindsight point of view.

The foreseeability concept applicable in ordinary contract cases, as well as in cases involving breach of admiralty warranties, is that "[n]o particular degree of remoteness in time or space, and no maximum number of intervening events, has ever been established as a dead line [sic] after which damages are not recoverable." 5 *Corbin on Contracts*, § 997, p. 20 (1964). When the captain of a vessel is actually negligent and when his negligence has contributed to the loss of the vessel or her cargo, the warrantor of safe berth is not relieved from liability. Instead, the damages due the non-breaching party from the breaching party are reduced to take into account the failure of the non-breaching party to mitigate damages.

Similarly in admiralty actions based on tort, contributory negligence is one of the faults to be compared in determining damages. Thus, in *Reliable Transfer* itself, the captain of the vessel that grounded was grossly negligent. He made a dangerous turn to pass a barge astern under dangerous conditions. He thereafter headed eastward believing that the vessel was headed toward open sea when, in fact, he was approaching a breakwater on which he later grounded. The breakwater had ordinarily been marked by a flashing light maintained by the Coast Guard, but the Coast Guard had negligently failed to maintain the light. Although the captain was exceedingly negligent and the Coast Guard was only ordinarily negligent, the district court and the Court of Appeals were compelled to apply the then-existing divided damages rule. This Court overturned the old rule in favor of comparative negligence because it was very unfair to compel equal division of damages when faults involved were

grossly unequal and when proportionate degrees of fault could be measured and determined on a rational basis. *Reliable Transfer Co.*, 421 U.S. at 405-406.

Here, the rational basis for determining comparative fault was destroyed when the district court prevented Exxon from proving any of respondents' faults before the breakout itself.

CONCLUSION

The decision below cannot be reconciled with the controlling admiralty policies established by this Court, with the decisions of other circuits, or with the fair trial standards that are embodied in the Due Process Clause.

Dated: October 31, 1995

Respectfully submitted,

SHIRLEY M. HUFSTEDLER
Counsel of Record
MORRISON & FOERSTER
555 West Fifth Street
Suite 3500
Los Angeles, California 90013-1024
(213) 892-5200

Attorneys for Petitioners

Admitted to the Bar
of the Supreme Court
on January 8, 1962